

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: Dmitry Grebenev
Serial No. 10/784,498
Filing Date: February 23, 2004
Examiner: Elmira Mehrmanesh
Art Unit: 2113
Confirmation No.: 2208
Title: KERNEL-LEVEL METHOD OF FLAGGING PROBLEMS
 IN APPLICATIONS

VIA ELECTRONIC FILING

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Dear Sir:

**NON-FEE PETITION UNDER 37 C.F.R. § 1.181 TO REVIEW PREMATURENESS
OF FINAL REJECTION**

This petition is filed in response to the final Office Action dated May 13, 2009 ("*Office Action*") and the Advisory Action dated July 14, 2009 ("*Advisory Action*"), in the above captioned application.

Applicants request the director consider the following attachments to this petition:

1. Copy of the non-final Office Action dated November 4, 2008
2. Copy of the Response to non-final Office Action dated February 4, 2009
3. Copy of the final Office Action dated May 13, 2009
4. Copy of the Response to final Office Action dated June 26, 2009
5. Copy of the Advisory Action dated July 14, 2009

This Petition under 37 C.F.R. § 1.181 is to request that the finality of the *Office Action* be withdrawn. Specifically, the Examiner has failed to properly respond to arguments raised in the Response to non-final Office Action dated February 4, 2009, and the Response to final Office Action dated June 26, 2009. Applicants have reminded the Examiner that, "[w]here

the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it." M.P.E.P. § 707.07(f). Additionally, the *Manual of Patent Examining Procedure* mandates: "Before final rejection is in order a clear issue should be developed between the examiner and applicant." M.P.E.P. § 706.07. "The examiner should never lose sight of the fact that in every case the applicant is entitled to a full and fair hearing, and that a clear issue between applicant and examiner should be developed, if possible, before appeal." As the Statement of Facts below will establish, the Examiner has failed to take note of Applicants' arguments and answer the substance of them. Accordingly, Applicants submit that the Examiner's decision to issue a final *Office Action* constitutes clear error, and Applicants respectfully request withdrawal of the finality of the *Office Action*.

Applicants have made a proper request for reconsideration and have received a repeated action by the Examiner per the requirements of 37 C.F.R. § 1.181(c). Applicants have spoken with Supervisory Examiner Robert W. Beausoliel in an effort to resolve this issue without need to petition the Director. No agreement was reached in these conversations.

Statement of Facts

1. Applicants provide the following statement of facts regarding Dependent Claim 2:
 - a. On Pages 13-14 of the Response to non-final Office Action dated February 4, 2009, Applicants argued:

Claim 2 is directed to the method of Claim 1, "wherein the system resource usage comprises a number of the one or more processes that each of the one or more applications have spawned and the predetermined criteria comprises exceeding a predetermined limit on the number of processes that each of the one or more user applications may spawn." The Examiner concedes that *Chen* fails to disclose a "predetermined limit on the number of processes that each of the one or more user applications may spawn." Accordingly, to reject these limitations, the Examiner cites to a "work synchronization" feature of *Lawlor* at Col. 47, lines 28-42. *See Office Action*, page 12.

According to *Lawlor*, "synchronization" is "the guarantee that an order or point of execution can be specified among two or more tasks." *Lawlor*, Col. 1, lines 46-51. To facilitate work synchronization *Lawlor* discloses a "SETCLV instruction [that] sets limits to the number of processes spawned." *Lawlor*, Col. 47, lines 28-29. When the spawn count is "equal to the count limit set by the Set Count Limit Value (SETCLV) . . . the parent process executes the next sequential instruction (NSI)." *Lawlor*, Col. 47, lines 38-41. Thus, *Lawlor* discloses performing an action when the count is *equal* to the

SETCLV. Claim 2, however, requires performing an action (identifying the first application to a user) if the system usage pattern *exceeds* the predetermined limit on the number of processes that each of the one or more applications may spawn. Moreover, Applicant respectfully submits that the limit on the number of processes spawned disclosed in *Lawlor* is not associated with one or more problems as required by Claim 2. Thus, for at least these reasons, the proposed *Chen-Lawlor* combination fails to disclose, teach, or suggest all of the limitations of Claim 2. Accordingly, Applicant respectfully submits that Claim 2 is allowable over the *Chen-Lawlor* combination under 35 U.S.C. § 103(a).

b. **The final Office Action dated May 13, 2009, completely disregards these arguments without any form of acknowledgement of explanation.**

Applicants brought this to the Examiner's attention on pages 18-19 of the Response to final Office Action dated June 26, 2009:

Unfortunately, the most recent *Office Action* ignores these arguments regarding *Lawlor*. Instead, the Patent Office states: "As per claims 1-3, 12, 14, 15, and 17-20, applicant's arguments have been fully considered but they are moot in view of new claim analysis. Refer to the corresponding section of the claim analysis for details." **However, the Patent Office does not provide a "new claim analysis" in response to these arguments, but instead repeats the previous rejections:**

As per claim 2, Chen discloses of monitoring processes (col. 93, lines 13-29).

However Chen fails to explicitly disclose a predetermined limit on the number of processes that each of the one or more user applications may spawn.

Lawlor teaches:

the system resource usage comprises a number of the one or more processes that each of the one or more user applications have spawned and the predetermined criteria comprises a predetermined limit on the number of processes that each of the one or more user applications may spawn (col. 47, lines 28-42).

Office Action dated November 4, 2008, at 12.

However Chen fails to explicitly disclose a predetermined limit on the number of processes that each of the one or more user applications may spawn.

Lawlor teaches:

the system resource usage comprises a number of the one or more processes that each of the one or more user applications have spawned and the predetermined criteria comprises a predetermined limit on the number of processes that each of the one or more user applications may spawn (col. 47, lines 28-42).

Office Action dated May 13, 2009, at 13.

- c. Applicants requested that the Examiner consider these arguments on pages 18-19 of the Response to final Office Action dated June 26, 2009:

“Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant’s argument and answer the substance of it.” M.P.E.P. § 707.07(f) (emphasis added). In the most recent *Office Action*, the Patent Office repeated its prior claim analysis without answering the substance of Applicants’ arguments. Thus, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009.

Accordingly, Applicant respectfully submits that Claim 2 is allowable over the *Chen-Lawlor* combination under 35 U.S.C. § 103(a).

- d. The Advisory Action dated July 14, 2009, failed to acknowledge these arguments.
- e. Concerned regarding the Patent Office’s disregard of Applicants’ arguments, Applicants contacted Supervisory Patent Examiner Robert W. Beausoliel. Supervisory Examiner Beausoliel dismissed Applicants’ concerns, suggesting that these arguments may have been addressed in a previous action. **However, this is incorrect: the Patent Office has failed to properly considered and answer the substance of Applicants arguments.**
2. Applicants provide the following statement of facts regarding Dependent Claim 3:
- a. On Page 14 of the Response to non-final Office Action dated February 4, 2009, Applicants argued:

Claim 3 is directed to the method of Claim 1, wherein “determining whether a system usage pattern of the first application satisfies a predetermined criteria associated with one or more problems comprises determining whether the first application has orphaned one of the one or more running processes.” The Examiner again points to the “work synchronization” feature of *Lawlor* to teach this limitation.

The portion of *Lawlor* cited by the Examiner provides:

Then the SETCLV instruction sets limits to the number of processes spawned. The EQTDE instruction spawns the processes; e.g., this is the "fork". In the example illustrated, in addition to the main line of application code (i.e., the "parent"), there are three processes (i.e., children) spawned. The main line of code continues until it issues the Receive Count (RECC) instruction. The spawned processes execute until complete at which time they each, in turn, encounter the Send Count (SEND C) instruction. The spawned processes or threads terminate with the Dequeue Thread Dispatch Element

(DQTDE) instruction. The count sent by the second of the spawned processes is equal to the count limit set by the Set Count Limit Value (SETCLV) instruction, at which point the parent process executes the next sequential instruction (NSI).

For the JOIN, the FORTRAN compiler generates an SRC (Thread Send/Receive Counter) and the inline code RECC SRC.sub.-- address. For the FORK (activate parallel thread) function, the compiler generates code to increment the SRC counter limit value. This keeps track of the number of parallel tasks.

Lawlor, Col. 47, lines 28-42. Applicant respectfully contends that *nothing* in this portion of *Lawlor* discloses, an “orphaned process”, let alone “determining whether the first application has orphaned one of the one or more running processes” as required by Claim 3. Moreover, to the extent that the Examiner intends to maintain this rejection, Applicant respectfully requests the Examiner to more specifically identify which portions of this section support the rejection so that Applicant may respond accordingly. For at least these reasons, Applicant respectfully contends that Claim 3 is in condition for allowance.

b. **The final Office Action dated May 13, 2009, completely disregards these arguments without any form of acknowledgement of explanation.**

Applicants brought this to the Examiner’s attention on page 20 of the Response to final Office Action dated June 26, 2009:

Unfortunately, the most recent *Office Action* ignores these arguments regarding *Lawlor*. Instead, the Patent Office states: “As per claims 1-3, 12, 14, 15, and 17-20, applicant’s arguments have been fully considered but they are moot in view of new claim analysis. Refer to the corresponding section of the claim analysis for details.” **However, the Patent Office does not provide a “new claim analysis” in response to these arguments, but instead repeats the previous rejections:**

Lawlor teaches:

comprises determining whether the first application has orphaned a process (col. 47, lines 28-42).

Office Action dated November 4, 2008, at 12.

Lawlor teaches: determining whether the first application has orphaned a process (col. 47, lines 28-42).

Office Action dated May 13, 2009, at 13.

c. Applicants requested that the Examiner consider these arguments on page 20 of the Response to final Office Action dated June 26, 2009:

“Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant’s argument and answer the substance of it.” M.P.E.P. § 707.07(f) (emphasis added). In the most recent *Office Action*, the Patent Office repeated its prior claim analysis without answering the substance of Applicants’ arguments. Thus, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009.

For at least these reasons, Applicant respectfully contends that Claim 3 is in condition for allowance.

- d. The Advisory Action dated July 14, 2009, failed to acknowledge these arguments.
 - e. Concerned regarding the Patent Office’s disregard of Applicants’ arguments, Applicants contacted Supervisory Patent Examiner Robert W. Beausoliel. Supervisory Examiner Beausoliel dismissed Applicants’ concerns, suggesting that these arguments may have been addressed in a previous action. **However, this is incorrect: the Patent Office has failed to properly considered and answer the substance of Applicants arguments.**
3. Applicants provide the following statement of facts regarding Independent Claim 9:
- a. On Pages 12-13 of the Response to non-final Office Action dated February 4, 2009, Applicants argued:

Applicant respectfully submits that *Chen* fails to disclose, teach, or suggest, “a number of processes that each of the one or more applications have spawned” as recited in Claim 9. The portion of *Chen* relied upon by the Examiner for teaching this limitation merely discloses an ability to monitor and control processes:

An important component of system and network performance tuning is the ability to access and alter the course of a process execution while it is running from any node in the system. . . . The system administrator needs to be able to adjust the priorities of processes to assure the smooth flow of work through a network of systems as well as to kill processes that have become “pathologically insane”, or running rampant.

Chen, Col. 93, lines 13-25. The Examiner has not pointed to any portion of *Chen* that teaches, suggests, or discloses that the processes were spawned by an **application**. Moreover, Applicant respectfully notes that the Examiner identifies a **process** ID of *Chen* as the “identifier of a first **application**” recited in Claim 10. *See Office Action*, page 5. Applicant respectfully submits that it is improper for the Examiner to rely on the processes disclosed in *Chen* as both a **process** and an **application** to reject the pending claims. Thus, for at

least these reasons, Applicant respectfully submits that Claim 9 is allowable under 35 U.S.C. § 102 over *Chen*.

- b. **The final Office Action dated May 13, 2009, responds by citing irrelevant passages from *Chen* while completely disregarding Applicants' arguments.** Applicants brought this to the Examiner's attention on pages 18-19 of the Response to final Office Action dated June 26, 2009:

However, in the most recent *Office Action*, the Patent Office does not respond to this argument; instead, the Patent Office picks and chooses more unrelated passages from *Chen*.

First, the Patent Office quotes *Chen* at column 22, lines 42-48, which states:

In fact, a console of instruments can be constructed to show data from local and remote hosts, including statistics on individual processes. Additionally, custom data from applications that have registered with the Data Server daemon can be added to the viewing instruments that show normal system statistics (also from local or remote hosts).

See Office Action at 15. Although this passage happens to use the words "processes" and "applications," this citation is not responsive to Applicants' concerns. As explained above, "the Examiner identifies a process ID of *Chen* as the 'identifier of a first application' recited in Claim 10." Thus, the fact that *Chen* uses the term "application" in other, unrelated passages does not explain why the Patent Office is applying the processes of *Chen* against both the "applications" and "processes" recited in Applicants' claims. Similarly, the Patent Office's citations to *Chen* at column 3, lines 50-58; column 16, lines 18-28; and column 93, lines 13-28 also fail to explain why the Patent Office is relying on the processes disclosed in *Chen* as both a process and an application to reject the pending claims.

- c. Applicants requested that the Examiner consider these arguments on pages 18-19 of the Response to final Office Action dated June 26, 2009:

Accordingly, Applicants respectfully request reconsideration of the arguments raised in the Response to Office Action dated February 4, 2009. Applicant respectfully submits that it is improper for the Examiner to rely on the processes disclosed in *Chen* as both a **process** and an **application** to reject the pending claims. Thus, for at least these reasons, Applicant respectfully submits that Claim 9 is allowable under 35 U.S.C. § 102 over *Chen*.

- d. The Advisory Action dated July 14, 2009, failed to acknowledge these arguments.

4. Applicants also challenged the finality of the *Office Action* on pages 20-21 of the Response to final Office Action dated June 26, 2009:

Applicant respectfully submits that the finality of the *Office Action* dated May 13, 2009, is premature. "Before final rejection is in order a clear issue should be developed between the examiner and applicant." M.P.E.P. § 706.07. "The examiner should never lose sight of the fact that in every case the applicant is entitled to a full and fair hearing, and that a clear issue between applicant and examiner should be developed, if possible, before appeal." M.P.E.P. § 706.07.

In this Response to Office Action, Applicants have identified at least three arguments that were ignored by the Patent Office in its most recent *Office Action*. **"Where the applicant traverses any rejection, the examiner should, if he or she repeats the rejection, take note of the applicant's argument and answer the substance of it."** M.P.E.P. § 707.07(f) (emphasis added). As explained above, the Patent Office has repeatedly failed to answer the substance of Applicants' arguments. Because the Patent Office has ignored Applicants' arguments, a clear issue has not developed between the Applicants and Examiner.

Accordingly, Applicant respectfully submits that the finality of the *Office Action* dated May 13, 2009, is premature and should be withdrawn.

- a. The Advisory Action dated July 14, 2009, failed to acknowledge these arguments.

Action Requested

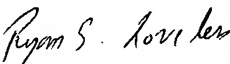
1. Applicants respectfully request that the Director withdraw the finality of the Office Action dated June 26, 2009, and reopen prosecution.

CONCLUSION

Applicant believes no fees to be currently due. However, if a fee is determined to be due, the Commissioner is authorized to charge such fee, or credit any overpayment, to **Deposit Account No. 02-0384 of BAKER BOTTS L.L.P.**

Respectfully submitted,

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Date: Aug. 10, 2009

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